

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANT
AND APPENDIX**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED JAN 19 1945

Joseph W. Stewart

CLERK

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 8909

287

MAJOR JOHN SHERMAN GULLET, U.S.A., *Appellant.*

v.

MARY M. GULLET, *Appellee.*

Appeal from the District Court of the United States for the
District of Columbia

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No. 8909

MAJOR JOHN SHERMAN GULLET, U.S.A., *Appellant.*

v.

MARY M. GULLET, *Appellee.*

Appeal from the District Court of the United States for the
District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellee filed, in the District Court of the United States for the District of Columbia, a complaint for maintenance against her husband, as authorized by Section 415, Title 16 of the Code of Laws for the District of Columbia, 1940 Edition.

The District Court entered a judgment in favor of appellee for permanent maintenance and attorney's fees, from which judgment this appeal has been taken under authority of Section 101, Title 17 of the Code of Laws for the District of Columbia, 1940 Edition.

STATEMENT OF CASE

On June 7, 1935, appellant and appellee were married in New York City, New York. At that time appellant was an officer in the United States Army and stationed in New York on active duty.

In December of 1937, appellant was ordered by the War Department to Washington, D. C. He and the appellee then came to Washington and made their home here as man and wife.

During the spring of 1940, the appellant was ordered by the War Department to Ottawa, Canada and shortly thereafter he reported to Ottawa on active duty with the army. Appellant did not take appellee with him when he went to Canada. According to appellant there had been differences between he and appellee prior to his removal to Canada and he apparently welcomed the opportunity to separate from appellee.

Appellee continued to make her home in Washington and apparently has lived here ever since. In November of 1940, appellee filed a suit for maintenance in the District Court for the District of Columbia. (A 1) On February 21, 1941, the District Court ordered appellant to pay the sum of \$175.00 per month to appellee as maintenance, pendente lite. (A 4)

Early in April, 1943, the appellant was ordered by the War Department to active duty in the State of Florida and on or about April 6, 1943, he reported in that state pursuant to the War Department's orders. During August, 1943, appellant filed a complaint for absolute divorce in Florida and on April 28, 1944, the Circuit Court in and for Dade

County, Florida, granted him an absolute divorce from the appellee. (A. 7) Appellant then filed a motion in the District Court of the United States for the District of Columbia asking that the aforementioned order for temporary maintenance be revoked. On October 25, 1944, appellant's said motion came on for hearing. At the same time appellee's suit for maintenance was set for final hearing. Appellant's motion was presented to the Trial Court and there was introduced into evidence a copy of the Florida decree. The Trial Court then advised appellant that his motion was overruled. Thereupon trial of the maintenance action was had.

Appellant's defense was that he was not the husband of appellee. (A. 5)

Appellee testified as to her income, resources and expenses and admitted having full knowledge of the Florida action but denied that appellant was or had been a bona-fide resident of Florida and that his Florida divorce was therefore not entitled to full faith and credit. Upon questioning by the Trial Court, counsel for appellee admitted that the question of due process did not enter into this matter and that the only question regarding the Florida divorce was that of domicile of the appellant.

Appellant was then called as a witness for appellee and he testified that he had gone to Florida under army orders; that while there he lived at a hotel and not in the army base; that during the period April 6, 1943 to April 28, 1944, he had on several occasions been out of the State of Florida for some length of time. He testified that he had not left the state voluntarily but only due to army orders. That he had voted in Florida, registered in the Tax Office there as a citizen of that state and at the present time considers himself to be domiciled in Florida. He further testified that he became such a resident on or about April 6, 1943. He identified the decree of the Florida Court which was offered

in evidence and said that he was not at this time the husband of appellee Appellee thereupon closed her case.

Appellant offered no evidence except the Florida decree and his aforementioned testimony.

On November 10th, the Court granted appellee permanent maintenance and counsel fees. (A. 6)

STATUTE INVOLVED

D. C. CODE, 1940

Title 16, Section 415 (14:75). Maintenance of wife and minor children—Enforcement.

Whenever any husband shall fail or refuse to maintain his wife and minor children, if any, although able so to do, the court, on application of the wife, may decree that he shall pay her, periodically, such sums as would be allowed to her as permanent alimony in case of divorce for the maintenance of herself and the minor children committed to her care by the Court, and the payment thereof may be enforced in the same manner as directed in regard to such permanent alimony. (Mar. 3, 1901, 31 Stat. 136, ch. 85, Tit. 980.)

STATEMENT OF POINTS

The Court erred in entering a judgment awarding permanent maintenance and counsel fees to appellee.

SUMMARY OF ARGUMENT

The judgment awarding appellee permanent maintenance was erroneously entered because the parties were not husband and wife.

A R G U M E N T

The primary question presented by this appeal is whether or not a woman may maintain an action for maintenance in the Courts of this jurisdiction after the Court of

another jurisdiction has awarded her former husband a decree of absolute divorce.

Before undertaking a discussion of that matter, it must be clearly understood that the validity of the foreign decree is not in dispute here. We are concerned only with the effect of that decree.

The appellant has shown that he was awarded a decree of absolute divorce from the appellee (A. 7), that he is not her husband and therefor is not suable under the Maintenance provision of the District of Columbia Code. Decisions on that point are not overly abundant; however they are sufficient to give ample and adequate support to this appeal.

As an approach to the question it may be helpful to first give consideration to what the digests say on the subject. At page 1278 of volume 27 of *Corpus Juris Secundum* we find the following:

"In the absence of a statutory authority a suit, whether commencing before or after the rendition of the foreign decree, to obtain an award of alimony may not be maintained after the court of another jurisdiction has granted a divorce with or without alimony."

The other leading digest, *American Jurisprudence*, takes a like view. In volume 17 at page 539 we find

"An absolute divorce terminates the marriage relation and the husband and wife are to each other as entire strangers; their duties inter se, which arose out of the marriage relation are terminated. By such divorce the marriage relation is as absolutely destroyed as if dissolved by death."

Those authorities are not, of course, binding on this Court. They do however, supply a background and are offered for that reason only.

More directly to the point is the case of *Bliss v. Bliss*, which this Court decided in 1931. In that case, reported in 60 App. D. C. at page 237, the woman sought relief under

our maintenance statute even though she had been divorced from the defendant. The Bliss case was different from the case at bar in that there the divorce was obtained by the woman; however that is a fact bearing on the validity of the divorce. We are concerned here only with the effect of a valid divorce. Considered in that light the legal principles involved are identical. Justice Groner, in writing the Bliss opinion, used language that seems particularly appropriate here.

“Plaintiff is not now the wife of the defendant, and is not entitled in her present state to invoke the provisions of section 70, *supra* When she shall have established the invalidity of her divorce, it will then be time enough to invoke the statute providing maintenance and support for a deserted wife.”

If we apply those words to the case at bar, we must inevitably conclude that so long as appellants divorce remains valid, the appellee is barred from any relief under our statute which offers maintenance and support to a wife.

A few years after the Bliss opinion, this Court had occasion to consider a case that, though not identical, was quite similar to the instant matter. *Bloedorn v. Bloedorn*, 64 App. D. C., 199 was controlled to a great extent by the Bliss case cited above. This Court, by the ruling therein, recognized that a maintenance order is based on the marriage state, and that when that state has ended the order must likewise expire. In referring to that legal principle this Court said:

“It was open to the husband at any time after obtaining his decree in Virginia to bring it into the District Court with a petition to vacate the decree for maintenance because of the subsequent dissolution of the marriage status it was intended to maintain.”

The Bliss and *Bloedorn* opinions were not departures from the law in this, or any other, jurisdiction. Those cases

merely followed an interpretation of the D. C. Code that had been made many years ago.

The case of *Thompson v. Thompson*, 35 App. D. C. 14, was a litigation strikingly like that with which we are here concerned. This Court held therein that:

“Inasmuch as the Virginia decree is *res adjudicata*, and binding in this district under the full faith and credit clause of the Constitution, it follows that the bill below should have been dismissed upon the plea of the Virginia decree in bar of this action.”

The decision of this Court was then taken to the United States Supreme Court. That tribunal, in affirming this Court, said:

“From this it appears that the Court of Appeals of the District of Columbia correctly held that the Virginia decree barred the wife's action for maintenance in the courts of this district.”

Since this appeal has to do with the effect of an absolute divorce it seems proper to inquire what the highest Court has to say on the subject. In the case of *Barrett v. Failing*, 111 U. S. 529 we find that such a decree

“put an end to all obligations of either party to the other and to any right which either has acquired by the marriage in the other's property, except so far as the Court granting the divorce, in the exercise of an authority vested in it by the legislature, orders property to be transferred or alimony to be paid by one party to the other.”

In view of that ruling on the effectiveness of such a decree it is difficult to understand how the appellee herein can maintain an action which has for a basis, the fact that she is still the wife of appellant. The relief she seeks is purely statutory. Concededly she must meet the requirements of that statute. Title 16, section 415 of the D. C. Code, on which her action is founded, is plainly worded and

certainly not subject to misconstruction. Section 415 can only apply.

“Whenever any husband shall fail or refuse to maintain his wife”

Those words are clear, explicit and open to only one interpretation. The section could not be applied against a son, nephew, uncle or any other person who is not a husband. This Court has ruled that the word “husband” does not mean “ex-husband”.

In 1936 this Court decided the case of Rapeer v. Colpoys, 66 App. D. C. 216. This Court held, in no uncertain terms that the above section does not apply unless the parties are actually still husband and wife. That it cannot apply after the parties have been divorced. In discussing the above section, the Court said:

“But section 75 is not ambiguous. By its plain terms it defines the power of a Court to make a support money order against a husband for the benefit of a wife and minor children, and does not embrace the case of an order against a divorced father.”

If the section cannot apply to a divorced father, certainly it cannot apply against a divorced husband.

The award of counsel fees, being based on the same premise as the award of maintenance, is equally in error. As is said in 17 American Jurisprudence at page 453:

“An allowance for counsel fees and suit money is, like an award of alimony, dependent upon the existence of the marriage relation.”

There is a statutory exception to that rule; however it is not important here.

From the above it is obvious that the first requirement in a maintenance action is to prove a marriage that is in existence. It is equally obvious that the appellant is not married to the appellee. When we apply that legal principle to the facts in the instant case we can not escape the con-

clusion that the Maintenance suit should have been resolved in favor of this Appellant.

CONCLUSION

It is urged in conclusion that the lower Court erred in awarding the appellee permanent maintenance and counsel fees.

Respectfully submitted,

JOHN T. BONNER,
Attorney for Appellant,
426 5th Street,
Washington, D. C.

APPENDIX

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IN THE
United States Court of Appeals
DISTRICT OF COLUMBIA

No. 8909

MAJOR JOHN SHERMAN GULLET, U.S.A., *Appellant.*

v.

MARY M. GULLET, *Appellee.*

APPENDIX

1 Endorsed: Filed Nov. 12, 1940, Charles E.
Steward, Clerk.

District Court of the United States for the District of
Columbia

Civil Action File No. 9040

MARY M. GULLET, *Plaintiff.*

v.

MAJOR JOHN SHERMAN GULLET, *Defendant.*

Plaintiff's address is 4707 Connecticut Avenue, N. W.,
Washington, D. C.

Defendant's address is G-2 Munitions Building,
Washington, D. C.

Complaint For Maintenance

Mary M. Gullet respectfully represents to the Court as follows:

1. That she is a citizen of the United States, a resident of the District of Columbia, has resided in said District since December, 1937, and files this complaint in her own right as the wife of the defendant, John Sherman Gullet.

2. That the defendant, John Sherman Gullet, is a citizen of the United States, a resident of the District of Columbia and temporarily assigned to duty as Air Attache at the United States Legation, Ottawa, Canada.

3. That the parties hereto were married on June 7, 1935 in New York City, New York and that there have been no children born as a result of this marriage.

4. Plaintiff further represents to the Court that after the marriage of the plaintiff and the defendant they lived in the State of New York until December, 1937 at which time the defendant was transferred to the District of Columbia where the plaintiff has resided ever since. That during the Spring of 1940, the defendant was assigned to duty as Air Attache at the United States Legation at Ottawa, Canada, and shortly thereafter the plaintiff went to Ottawa for the purpose of maintaining a home with the defendant, but after she arrived he refused to furnish her with suitable quarters and she was compelled to return

2 to her home in Washington, D. C., and since that time has not cohabited with the defendant. Shortly thereafter, the defendant directed a letter to the plaintiff in which he informed of his desire and intention to live separate and apart from her. He thereupon removed his personal effects and has since maintained his residence at Ottawa, Canada.

5. Plaintiff further says that the defendant receives as compensation for his services as a Major in the United States Army in excess of \$750.00 per month and is well

able to maintain and support the plaintiff who is without any personal income or other means of support. Plaintiff further says that she has no training or experience which would enable her to obtain suitable and gainful employment, and at the present time due to the fact that she recently underwent a serious operation, her physical condition is such that it is impossible for her to do any work other than her household duties.

WHEREFORE, the premises considered, the plaintiff prays:

1. The United States Writ of Summons issue out of this Honorable Court, directed unto the defendant, John Sherman Gullet, requiring him to appear herein and answer the exigencies of this complaint.

2. That plaintiff be awarded by this Court maintenance pendente lite for her separate maintenance.

3. That upon a final hearing hereof, the Court awarded to the plaintiff permanent maintenance for her support.

4. That the plaintiff be awarded a reasonable sum for counsel fees, together with suit money and Court costs.

5. That the defendant be restrained and enjoined from molesting, interfering with, annoying and threatening the plaintiff.

6. And for such other and further relief as to the Court may seem just and proper.

MARY M. GULLET,
Plaintiff.

W. B. O'CONNELL,
Attorney for Plaintiff,
203 Union Trust Bldg.,
Washington, D. C.

DISTRICT OF COLUMBIA, ss:

3 Mary M. Gullet, being first duly sworn on oath according to law deposes and says that she has read

the foregoing complaint by her subscribed and knows the contents thereof; that the matters and things set forth therein as being based upon her own knowledge are true, and those matters and things set forth therein as being based upon information and belief, she verily believes to be true.

MARY M. GULLET,
Plaintiff.

Subscribed and sworn to before me this 12th day of November, 1940|

FRANK J. GREENWELT,
Notary Public, D. C.

7 Endorsed: Filed Feb 21 1941 Charles E. Stewart,
Clerk.

Order For Maintenance

On consideration of the bill of complaint filed herein, and the Court being advised in the premises, it is, this 21st day of February, 1941,

ORDERED, That the defendant John Sherman Gullet pay to the plaintiff, Mary M. Gullet, as maintenance pendente lite one hundred and seventy-five dollars per month, and,

It is further ordered that the defendant pay to William B. O'Connell, attorney for the plaintiff one hundred dollars as compensation for services heretofore rendered herein.

By the Court:

T. ALAN GOLDSBOROUGH,
Justice.

14 Endorsed: Filed Nov. 7, 1944 Charles E. Stewart,
Clerk.

Supplementary Answer of Defendant

Comes now the defendant and for a further and supplementary answer to the complaint filed herein shows to this Honorable Court as follows:

1. That he is not the husband of the plaintiff in this cause.

2. That on the 28th day of April, 1944, the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County granted him an absolute divorce from the plaintiff herein.

WHEREFORE, defendant prays:

1. That this suit for maintenance be dismissed.

2. For such other and further relief as the case may require.

JOHN SHERMAN GULLET.

SUBSCRIBED and SWORN to before me this 2nd day of Nov., 1944.

BLANCHE W. ROBY,
Notary Public.

My Commission Expires May 3,
1947.

JOHN T. BONNER,
Attorney for Defendant,
426 5th Street, N. W.,
Washington, D. C.

15 Endorsed: Filed Nov. 10, 1944 Charles E. Stewart,
Clerk.

Order For Permanent Maintenance

This cause came on to be heard at this term of court on the pleadings filed herein and evidence adduced in open court, it being established to the satisfaction of the court that the plaintiff, Mary M. Gullet is entitled to permanent maintenance from the defendant, John Sherman Gullet, it is by the Court this 10th day of November, 1944,

ORDERED, that the defendant pay to the plaintiff monthly on the 15th day of each month the sum of \$250.00 until the further order of this Court, and it is further,

ORDERED, That the defendant pay to William B. O'Connell, the attorney for the plaintiff the sum of (\$800) eight hundred dollars as compensation for services rendered herein.

By the Court:

T. ALAN GOLDSBOROUGH,
Justice.

EXHIBIT A

IN THE

**Circuit Court of the Eleventh Judicial
Circuit of Florida in and for
Dade County**

JOHN S. GULLET, *Plaintiff*,

v.

MARY M. GULLET, *Defendant*.

Final Decree

In Chancery, No. 80346-E.

8 Endorsed: Filed July 13, 1944 Charles E. Stewart,
Clerk.

This cause coming on to be heard this day upon the Plaintiff's Bill of Complaint, the Decree Pro Confesso which has been duly and regularly entered against the Defendant, and the report of the Special Master filed herein and Plaintiff's Motion for a Final Decree, and it appearing to the Court and the Court finding from said Bill of Complaint, the Decree Pro Confesso and the Special Master's Report that it has jurisdiction of and the parties to this cause that the relation of husband and wife now exists between the parties hereto and that the Defendant, Mary M. Gullet is guilty of extreme cruelty to Plaintiff as charged in said Bill as set forth in the said Special Master's Report, and the Court being fully advised in the premises, it is, upon consideration

ORDERED, ADJUDGED AND DECREED:

That the Special Master's Report and recommendations be and the same is hereby approved and confirmed, and the marriage between the Plaintiff, John S. Gullet and the Defendant, Mary M. Gullet, be, and the same is hereby dissolved, and said parties and each of them are hereby forever freed from the bonds of matrimony heretofore existing between them and from the obligations arising therefrom.

9 DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 28 day of April, A. D. 1944.

MARSHALL C. WISEHEART,
Circuit Judge.

A true Copy of the Original on file in the Clerk's Office.

WITNESS my hand and Official Seal. This 27 day of May A. D., 1944 C.G.B. 688, page 55.

E. B. LEATHERMAN,
Clerk Circuit Court.

By C. Peeler D. C.

PORTIONS OF TRANSCRIPT

24 Mr. Bonner. If the Court pleases, I would like to be heard at this time on our motion to revoke this order if you desire.

The Court. That is what I want.

25 Mr. Bonner. There is in the file now before your Honor and there is in evidence in this case a decree of a court for the State of Florida awarding a divorce to Major John Sherman Gullet.

I offer that decree at this time and ask your Honor on

the basis of that decree to sign an order here revoking the maintenance allowance which was heretofore made.

The Court. Have you any authority for that?

Mr. Bonner. I have, sir; I have authority. On what proposition does your Honor want authority?

The Court. On this proposition: the only thing that is disturbing me at the moment is whether or not a decree of divorce automatically abrogates an order for maintenance. That is the only thing before me at the moment.

Mr. Bonner. Here is my answer to that, sir: in order to have an award for maintenance, bearing in mind this court has never made a permanent order—the maintenance case has never been tried—in order for this court to award an order the plaintiff must show that she is the legal wife of the defendant.

Under our Code it says you may force a husband to support his wife—

The Court. (Interposing) No. What I want to know from you right now is have you any authorities to support your legal contention, because the Court does not think there is a thing in it in the world, and in the absence of authority the Court refuses your motion.

26 Mr. Bonner. I refer your Honor to a recent case.

There have been many of them in our courts. A most recent one was one decided by Justice O'Donohue.

The Court. I mean the Court of Appeals. The Court that has got the last guess is the one I want to hear about.

Mr. Bonner. If the Court please, I am taken completely by surprise by this question. It has always been my thought—

The Court. (Interposing) No. But I want to know where this authority is. Take the authority of this court if you have not any authority of the Court of Appeals.

Mr. Bonner. The authority is based on plain common sense, if the Court please.

The Court. You mean the Court ought to know that much anyway.

Mr. Bonner. If your Honor please, I want to put it this way: we say these parties are not married. How can any court make an award—

The Court. (Interposing) Unless you can show me an authority, sir, your motion is dismissed.

Mr. Bonner. Let me get your Honor's ruling straight.

We have filed a motion to revoke an order on the finding of the Florida court. The Florida court divorced these people. On the basis of that finding we ask your Honor to vacate the order for maintenance here.

27 Do I understand your Honor to say that assuming that the Florida court has made a perfectly legal order of divorce, and assuming that these people are now divorced is it your Honor's contention that you are still going to make this defendant pay maintenance to his wife?

The Court. I am not going to adopt your language necessarily or let you put words in my mouth.

Mr. Bonner. I will be glad to—

The Court. (Interposing) But I say to you this: the only thing before me at the moment is the question as to whether or not the granting of an absolute divorce revokes an order for maintenance.

Mr. Bonner. All right.

The Court. And it does not. And if that is as far as you can go the motion will have to be dismissed.

Mr. Bonner. Then will your Honor make a finding of fact in this case that the defendant has obtained a legal bona fide divorce in Florida?

The Court. No; I do not know anything about that.

Mr. Bonner. How can we answer the second question, if the Court pleases? You have to predicate your ruling on a finding that there was not an absolute divorce in Florida, otherwise there is no point to it.

The Court. Maybe there is not, but that is my ruling.

28 Mr. Bonner. As I say, there is one point I want to get clear. Your Honor is supposed to, and I know you will make findings of fact on a question of law.

Will your Honor find as a fact that this man received a divorce in Florida?

The Court. I will find the findings of fact as they are. I am not going to tell you that or any other lawyer. I will find the findings of fact as they are. There is no evidence before me at all.

You contend or you make a motion—

Mr. Bonner. (Interposing) That is correct, sir.

The Court. (Continuing)—that because your client obtained a divorce in Florida that that automatically revokes this order for maintenance. That is the finding of fact that I will make to the Court of Appeals. The only thing before me is this on your motion.

Mr. Bonner. I do not say that.

The Court. That the contention is made by the defendant. that because an absolute divorce was granted by a Florida court to the defendant that that automatically revokes the order for maintenance passed by this court, and the court denies the motion; and that is my finding of fact.

Mr. Bonner. If the Court pleases, we do not contend that that was automatically revoked in Florida or in this court. We submitted it to your Honor as being a fact which you should consider in hearing this motion.

29 The Court. Of course, I will consider it. I will consider anything a fact that is a fact.

But your contention up to this minute—you may have changed it in the last five minutes—is that because that divorce was granted that that required this court to revoke its order for maintenance. That has been your contention up to this time. The Court does not think there is any such law as that anywhere. The idea that man can run around the country and get a divorce avoiding an order of maintenance is ridiculous.

Mr. Bonner. That is why I took exception to Mr. O'Connell's statements and by making those statements he has prejudiced this court.

The Court. He has not prejudiced this Court at all.

The Court states as a matter of law that the fact that a divorce was granted in Florida or any other State does not revoke an order of maintenance passed by the Court in the District of Columbia. That is what the Court says, and that is all the Court says.

Mr. Bonner. Very well, sir.

We are now on trial on the plaintiff's suit for maintenance set for hearing.

The Court. That is not before me.

Mr. Bonner. It certainly is.

Mr. O'Connell. Yes. The motion having been passed on then your Honor can determine on a final order in the suit for maintenance.

30 The Court. I thought the order had already been passed.

Mr. O'Connell. That is not the final order.

The Court. All right, sir. You may proceed.

Mr. O'Connell. You take the stand, Mrs. Gullet.

* * * * *

40 Mr. O'Connell. I think that is all.

Mr. Bonner. I have no questions of this witness.

Mr. O'Connell. I think I have proved sufficient to suggest signing an order.

Mr. Bonner. If the Court pleases, at this time I ask your Honor to permit me under our rules to file a supplementary answer by the addition of one paragraph alleging that the defendant is not the husband of the plaintiff.

The Court. I do not think you can claim surprise, can you?

41 Mr. O'Connell. No.

The Court. All right.

Mr. Bonner. We will consider that as in the answer then?

The Court. I think you ought to write a paper and put it in the proceedings.

Mr. Bonner. I will do that, but I would like to proceed now with the defense.

The Court. That is all right, sir.

* * * * *

47 Mr. Bonner. I am just about to make a statement, sir.

The plaintiff has concluded his case.

We have and we now offer to this Court the decree of the Florida court and submit that these parties are not man and wife at this time. I say to your Honor that she must have a finding against her.

48 The Court. Is there any evidence as to the invalidity of the Florida divorce? Are you offering any evidence as to the invalidity of the Florida divorce?

Mr. O'Connell. Yes, I would like to.

The Court. Of course, if I am going to decide the case I have got to have the facts.

* * * * *

92 The Court. As I understand it, counsel for the respondent does not raise any question of jurisdiction except that based upon the domicile of the petitioner.

Mr. Bonner. I asked the Court that question before I started. I wanted to save time, if your Honor pleases.

The Court. That being so, there is no necessity of going into this testimony.

Mr. Bonner. Then we understand the only question in this case is the domicile of Colonel Gullet?

The Court. That is the only question that has been raised.

Mr. Bonner. Very well, sir. I have no further questions of this witness.

93 The Court. Step down.

(Witness stands aside.)

Mr. O'Connell. I have no further testimony.

The Court. Now, I want you gentlemen to submit whatever authorities you have.

* * * * *

94 Mr. Bonner. Would your Honor help us at this time by stating what is the question in the mind of the Court?

The Court. The only question in the world is whether or not your client had a domicile in Florida at the time he filed a divorce.

* * * * *

97 Mr. Bonner. Now, will your Honor want us to prepare an order overruling the motion?

The Court. No, sir. I do not want any order prepared until I make up my mind.

Mr. Bonner. You overruled our motion before we went into the maintenance matter. I suppose you want me to prepare an order on that phase of it?

Mr. O'Connell. We can prepare an order on the whole thing whenever we get the decision.

The Court. I thought about it during the recess and I am not going to pass upon the motion until I have decided the whole thing.

Mr. Bonner. Then you mean your Honor does not—I made a motion based on the decree, and your Honor overruled that without going into the testimony.

The Court. I know I did. But there is no necessity of having two rulings about the same thing. When I have passed upon the question about jurisdiction then I will pass upon the motion. The motion has not been ruled upon and will not be until I have reached the other decision.

* * * * *

100 ORAL OPINION OF THE COURT

The Clerk. The case of Mary M. Gullet vs. Major John Sherman Gullet.

The Court. Gentlemen, is there anything further you would like to say before the Court passes on this question?

101 Mr. O'Connell, I do not think I have anything further.

Mr. Bonner. No, sir.

The Court. The matter before the Court in the last analysis is this: a Court in this jurisdiction, with both parties before it, signed an order for temporary alimony or temporary maintenance based upon the allegations of a complaint which was sufficient in this jurisdiction to justify it. Otherwise it would not have been signed.

Now, the defendant does not come into this Court and contest the maintenance case, he does not meet that issue, nor does he undertake to get an absolute divorce in this jurisdiction which would practically automatically relieve him from the payment of anything. But he does this: he avoids the issue by going to another jurisdiction where the requirements for an absolute divorce are not as vigilant as they are in this jurisdiction and he undertakes to defeat the maintenance order by getting the divorce there.

The Court is of the opinion it is not necessary for the Court to pass upon this question as to whether or not he acquired a domicile in Florida, or whether or not there is any constitutional question involved. The Court is perfectly clear that he could not defeat the action for maintenance in this jurisdiction where the Court had acquired jurisdiction over both parties by going into another jurisdiction and getting a divorce or taking any other proceeding.

102 So that the motion before the Court, which is a motion to dismiss—

Mr. O'Connell. (Interposing) To vacate an order.

The Court. (Continuing)—to vacate the order is denied, gentlemen.

Mr. O'Connell. If your Honor please, this having been a final hearing on this maintenance suit it now becomes incumbent upon the Court to review a decision to fix a permanent order.

The Court. Is that before me now?

Mr. O'Donnell. I think so.

The Court. Is that your view?

Mr. Bonner. That is what we tried before your Honor the other day.

The Court. Sir?

Mr. Bonner. That is what we tried before your Honor the other day.

Mr. O'Connell. And before you fix any final order that was an order pendente lite. According to the testimony of the Colonel, he has considerably increased his income.

If you will look at that report from Mr. Hamilton at the time the matter was before him at that time the Colonel had, according to his own testimony, \$30,000 worth of life insurance which he was paying premiums on which were made payable to his wife. Now he has changed that beneficiary under those policies and made them payable to his sister. He also, according to his testimony, has had an increase of about \$150 of income.

103 The Court. Do I understand that the defendant in this case—I want to be sure I am not taking any undue advantage—should not he be given an opportunity now, if he desires, to have the maintenance case tried on its merits?

Mr. O'Connell. I think we have tried it on its merits.

The Court. Do you think so?

Mr. O'Connell. Yes, sir, before your Honor.

The Court. I was under the impression—you see I have not examined these papers carefully—I know what the

matter is, but I have not made any exhaustive examination of the papers. My impression was the thing I was passing upon the other day was whether or not the Florida divorce of itself practically automatically defeated this maintenance case. Now, if the defendant wants to change its answer in any way so as to fight the maintenance case on its merits the Court thinks he ought to be given an opportunity to do it if he desires.

Mr. Bonner. I may say your Honor has helped me a lot by that last statement you made, because I can see now all through this thing I have been looking at one point and your Honor at another one. I suppose it was my fault that that happened. Of course, I was of the opinion that your Honor had overruled that motion earlier the other day when we were in here.

104 The Court. I overruled it at that time because there was nothing before the Court which would justify doing anything else.

Mr. Bonner. Then of course, to be frank with your Honor, I was prepared to stand on that ruling with the thought of an appeal because I felt we had not been given an opportunity to go into the matter thoroughly.

Now, if your Honor please, as the result of that feeling I put no evidence at all on when we were going into the question of maintenance, and I feel as your Honor does apparently now that we should have an opportunity.

The Court. You should have the opportunity if you want it. There is no question about that in my opinion. Both sides should have the opportunity.

Mr. O'Connell. According to the Colonel's own testimony when she went to Canada he ran her out and has not lived with her or supported her since.

The Court. That is true. But we sort of sidetracked all of that and went into a question of law. And if they want to offer further testimony or you want to offer further testimony I think the Court should hear it.

Mr. O'Connell. I have no objection to that whatever. I think we ought to get ourselves in a position where we can furnish the Court with proper testimony and where the Court will be in a position to enter a final order.

105 The Court. When would you like to take it up?

Mr. Bonner. If the Court please, the defendant is in Ohio, commanding an Air Base out there, and is going to be shipped overseas on the 15th. I can not advise the Court when he can come back.

The Court. If he is going across I will hear it at any time you want it set.

Mr. Bonner. Let us see if I understand your Honor's ruling on that motion. Does your Honor feel when this case comes to trial on its merits we can meet it by proof that she is not the wife of this defendant and in that manner bring in that Florida decree? We take the position they are not married of course, and she will have to show they are married in order to prevail at a final hearing.

The Court. My ruling is that the marriage in Florida does not have any effect, that the divorce in Florida does not have any effect whatever upon this maintenance case.

Mr. Bonner. On the final case itself?

The Court. Yes. Of course, you have your exception, and you can take that on to the Court of Appeals.

Mr. Bonner. Yes, sir. Then the only question we could raise at a final hearing—

The Court. (Interposing) Is as to how much it should be, that is all.

Mr. Bonner. (Continuing) Is as to how much it should be.

BRIEF FOR APPELLEE FILED FEB 15 1945

Joseph R. W. Stewart

CLERK

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA

—
No. 8909
—

MAJOR JOHN SHERMAN GULLET, U.S.A., *Appellant.*

v.

MARY M. GULLET, *Appellee.*

—
Appeal from the District Court of the United States for the
District of Columbia
—

WILLIAM B. O'CONNELL,
Union Trust Building,
Washington, D. C.
Attorney for Appellee.

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA

No. 8909

MAJOR JOHN SHERMAN GULLET, U.S.A., *Appellant.*

v.

MARY M. GULLET, *Appellee.*

Appeal from the District Court of the United States for the
District of Columbia

BRIEF FOR APPELLEE

This case involves the validity of a Florida decree of divorce. Briefly, the situation is as follows:

The appellant and appellee maintained their residence and domicile in the District of Columbia for several years before their separation. He was ordered by the War Department to Ottawa, Canada, for duty, during the Spring

of 1940. Shortly thereafter his wife went to Ottawa to be with her husband. For some reason he did not want her and notified the hotel in which she was staying that he would not be responsible for her bill. As a result of this she returned to Washington and filed her suit for separate maintenance.

The appellant was personally served with process in the District of Columbia by a deputy United States Marshal. The appellant filed his answer in which he admitted under oath that he was then a resident of the District of Columbia, and the court entered an order for the payment of One Hundred and Seventy-Five Dollars (\$175.00) per month pendente lite, with his consent.

The case was duly calendared for trial, and while the case was so pending the appellant was ordered to the State of Florida for temporary duty. The appellant drove to Florida in his car. He testified that it was while on the way there he formed his intention to become a resident of Florida. Shortly after he arrived in Florida he consulted an attorney regarding the steps he should take to obtain a divorce, and as a result made a declaration of his intention to become a permanent resident of the State of Florida.

During the entire time he remained in Florida, which according to his testimony, was less than the ninety days required by the Florida statute, he lived in an hotel that was being operated by the United States government under lease.

About sixty days after appellant arrived in Florida, he was ordered to Birmingham, Alabama, where he remained for some time, and then was ordered to Ohio for duty where he was stationed at the time of the hearing of this case.

It was while the appellant was stationed in Alabama that he filed his suit for divorce in Dade County, Florida.

The appellee was not served with process, but did receive a notice that the suit had been filed. She entered no appearance, and never authorized any one to appear for her. The appellant's attorney was notified of the order which had been entered by the District Court for the District of Columbia.

Eventually the Florida court entered a decree of divorce, and the appellant filed his motion here to vacate the order for maintenance because he contended he was no longer the husband of the appellee. This the court refused to do, and this appeal is from the ruling on this question.

ARGUMENT.

Admittedly the legal question involved is at the present time in a state of confusion. However, there is one element in this case that is not involved in the other cases pending. That is, the appellant is an officer in the United States Army. The law seems to be fairly well settled that a man in the service does not acquire a domicile in a jurisdiction where he is ordered to temporary duty.

Lowe v. Lowe, 150 Md. 592, 133 A. 729, 46 L. R. A., 983.

Pendleton v. Pendleton, 109 Kan. 600, 201 Pac. 62.

Dennet v. Dennet, 63 App. D. C. 252, 71 Fed. (2nd) 975.

Dicks v. Dicks, 177 Ga. 379, 170 S. E. 245.

(See also 106 A. L. R. 53.)

In the present case the court below did not make a ruling as to the validity of the Florida decree. While there was ample testimony on which the court could have held the decree invalid, the court was of the opinion that jurisdiction of the parties and subject matter having been obtained by personal service in the District of Columbia, this jurisdiction could not be ousted by a mere transitory residence in Florida. This would seem to be the logical way of ap-

proaching the question involved. It should be incumbent on the appellant, if he seeks to avoid a decree in the District Court here, to prove by competent testimony that the decree obtained in a foreign jurisdiction was fairly and honestly obtained, rather than to put the burden on the appellee to prove that it was not so obtained.

The appellant did nothing in the State of Florida to indicate he intended to make it his permanent residence. He paid no taxes there, purchased no property, established no permanent address, never voted there until after he filed his motion here, had no bank account there, never identified himself with any church, club and did none of the things one ordinarily does when he honestly intends to become a permanent resident of a community or state.

Appellant relies on the case of *Bloedorn v. Bloedorn*, 64 App. D. C. 199, 76 Fed. (2nd) 812. However, that case is not in point for the reason that the wife entered a general appearance there and submitted to the jurisdiction of that court. We have a different situation here. Counsel for appellee is conscious of the unsettled state of the law regarding foreign decrees, but feels that one who relies on a foreign decree to defeat an order regularly entered in the courts of the District of Columbia should assume the burden of establishing by competent testimony that the decree he relies on was procured in a manner which entitles it to full faith and credit.

For these reasons it is respectfully submitted that the order of the court below should be affirmed.

Respectfully submitted,

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